

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JERRY O'NEIL,

Plaintiff,

vs.

CHIP WEBER, in his capacity as
Forest Supervisor for the Flathead
National Forest; and the UNITED
STATES FOREST SERVICE, a
federal agency,

Defendants.

CV 19-140-M-DLC

ORDER

Before the Court is the Findings & Recommendation of United States Magistrate Judge Kathleen L. DeSoto. (Doc. 27.) Judge DeSoto recommends that the Court deny Defendant United States Forest Service's F. R. Civ. P. 12(b)(5) Motion to Dismiss for Improper Service. (*See* Docs. 24, 25.) Should the Court adopt this recommendation, Judge DeSoto further recommends that the Court grant Plaintiff Jerry O'Neil ten days from the date it enters this Order to complete service on Defendants. (Doc. 27 at 5.) No party filed objections.

Absent objection, the Court reviews for clear error. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error review is "significantly deferential" and exists if the Court is left with a "definite and firm conviction that a mistake has been

committed.” *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000) (citations omitted).

Here, and as Judge DeSoto succinctly puts it, O’Neil certainly has had difficulty accomplishing service pursuant to Federal Rule of Civil Procedure 4. In his service attempt that precipitated the instant motion to dismiss, O’Neil mailed Defendants a different version of complaint than the one he filed with the Court. (Doc. 26 at 1.) O’Neil blames “sloppy work” for his mistake. (*Id.* at 6.) Be that as it may, the Court finds no clear error in Judge DeSoto’s finding that Defendants will suffer no prejudice by extending the time for service, as they are aware of the general charges O’Neil lodges against them. *See Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007). The Court’s conclusion is buttressed by the lack of objection from Defendants. Therefore, the Court agrees that dismissal for failure to perfect service is inappropriate at this point.

However, Judge DeSoto’s recommendation to grant O’Neil ten days to serve Defendants from the date the Court enters this Order has been rendered moot. Four days after Judge DeSoto entered her Findings and Recommendation, O’Neil filed an Affidavit of Corrected Service, stating that he had fixed his mistake and served Defendants properly with the correct version of his complaint. (Doc. 28.) Neither Defendant refutes O’Neil’s representation that they have now been properly served.

Accordingly, IT IS ORDERED that the Court ADOPTS Judge DeSoto's Findings and Recommendation (Doc. 27) with the following modification:

(1) IT IS ORDERED that Defendant United States Forest Service's F. R. Civ. P. 12(b)(5) Motion to Dismiss for Improper Service (Doc. 24) is DENIED.

(2) IT IS FURTHER ORDERED THAT, because O'Neil accomplished service on Defendants four days after Judge DeSoto entered her Findings and Recommendation, her recommendation to grant him additional days following the issuance of this Order is REJECTED AS MOOT. No further action on this issue is required of the Court.

DATED this 8th day of September, 2020.



Dana L. Christensen, District Judge
United States District Court